No. 86-808

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALBERT MARCHINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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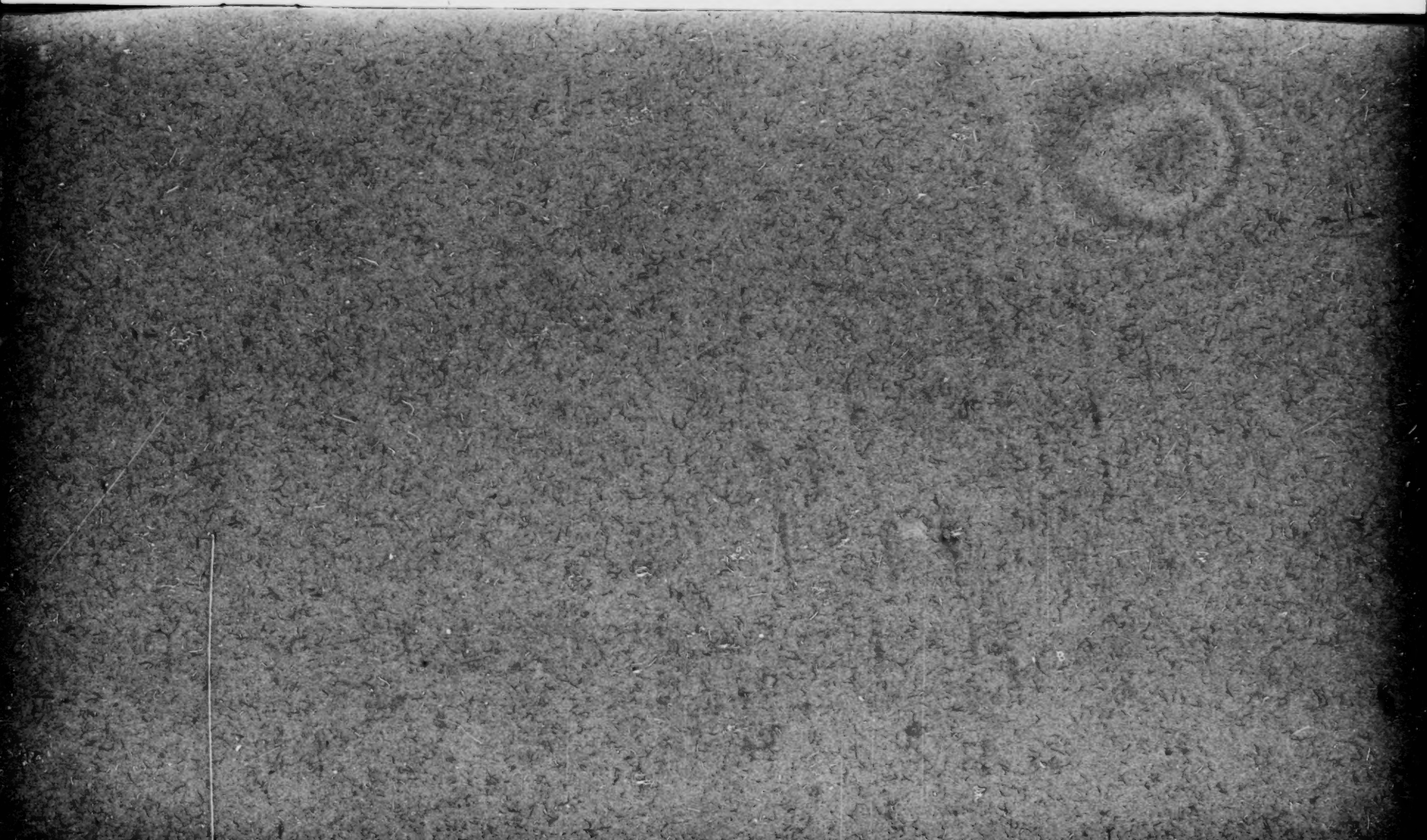

QUESTIONS PRESENTED

1. Whether the admission at petitioner's criminal trial of his wife's grand jury testimony under Rule 804(b)(5) of the Federal Rules of Evidence was improper under the Rules or under the Confrontation Clause of the Sixth Amendment.

2. Whether the district court abused its discretion by admitting a summary exhibit and the testimony of the government's "expert summary witness."

3. Whether the district court committed plain error in delivering an "*Allen*" charge.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A31) is reported at 797 F.2d 759.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1986. A petition for rehearing was denied on September 22, 1986 (Pet. App. B1). The petition for a writ of certiorari was filed on November 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioner was convicted on 15 counts of willfully filing false employer's tax returns, in violation of 26 U.S.C. 7206(1). Petitioner was sentenced to a two-year term of imprisonment on Count Two. On the remaining counts, petitioner was placed on probation for a period of five years, to follow the term of imprisonment imposed on Count Two. The court of appeals affirmed (Pet. App. A1-A31).

1. The evidence at trial established that between 1968 and late 1980 petitioner was the owner and operator of Marchini Construction Company, Inc., located in Las Vegas, Nevada. Marchini Construction employed a bookkeeper, a general office secretary/payroll clerk, and between 100 and 300 construction employees at any given time. The secretary/payroll clerk, Kathleen Anne Snyder, married petitioner in 1983. Pet. App. A3. Petitioner admitted at trial that sometime before 1977 his company began paying its employees' weekly wages partially by check and partially by cash (7/18/84 Tr. 183-184). The company paid its supervisory and office staff in a similar manner even though they did not demand cash payments (*id.* at 221, 222).

In order to generate cash for those wage payments, petitioner made out checks to fictitious suppliers, forged the endorsements of fictitious persons, signed the checks as a second endorser, and then cashed the checks (7/17/84 Tr. 268-269; 7/18/84 Tr. 223). Petitioner admitted that he did not report the cash wages on his company's Employer's Quarterly Federal Tax Return Form 941 or on his company's Employer's Annual Federal Unemployment Tax Return Form 940 during the periods alleged in the indictment (Pet. App. A3-A4). His defense was that he believed it was the responsibility of his employees to report wages paid to them in cash; petitioner, however, did not report the cash wages that the company paid to him (*id.* at A4).

In addition, petitioner's accountant testified that petitioner had stated on several occasions in 1976 that he did not want to file the Forms 941 and that he would not file them if he could get away with it (7/16/84 Tr. 156-160). The company's general superintendent also testified that in 1980 he had discussed with petitioner the company's failure to report cash wages paid to employees. Petitioner

had stated at that time that he "would probably be in trouble with the IRS" and he would have to "pay for it later" (*id.* at 173-174, 195).

2. On appeal, petitioner claimed that the district court had erred by admitting Kathleen Snyder's grand jury testimony. Before her marriage to petitioner, Snyder had testified before the grand jury, describing her duties as the secretary/payroll clerk for petitioner's business, describing its office procedures, and admitting that she had cashed several false supplier checks at petitioner's request (7/17/84 Tr. 20-73). At trial, however, she had invoked the marital privilege and was therefore "unavailable" to testify within the meaning of the hearsay rules. The district court had admitted her testimony under Fed. R. Evid. 804(b)(5), the "catch-all" exception for unavailable declarants, and had rejected a contention that admission of the testimony would violate petitioner's rights under the Confrontation Clause. The court of appeals agreed. Pet. App. A6-A19.

The court of appeals noted that the circuits are in general agreement that grand jury testimony can be admitted under Rule 804(b)(5), and it adopted the analytical approach of the Sixth Circuit as set forth in *United States* v. *Barlow,* 693 F.2d 954, 961-962 (1982), cert. denied, 461 U.S. 945 (1983). In upholding the admission of the testimony, the court pointed to the detailed factual findings of the district court that Snyder's testimony was "confirmed by every witness who has testified in this case, including the banker" (7/17/84 Tr. 3, 11, 15-17); that her testimony was corroborated by other evidence, including the testimony of her husband; that Snyder was under oath and had no motive to falsify her testimony; that the testimony was based on Snyder's personal knowledge; that Snyder never recanted her testimony; and that her marriage to petitioner was the reason she was unavailable (Pet. App. A12-A14; 7/17/84 Tr. 3-6). Emphasizing that its

holding was narrow and that it was not sanctioning the introduction of all grand jury testimony whenever the witness is unavailable, the court of appeals also concluded that, on the particular facts before it, the testimony bore "particularized guarantees of trustworthiness" (see *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980) (footnote omitted)). Admission of the testimony therefore did not violate petitioner's rights under the Confrontation Clause. Pet. App. A15-A19.

The court of appeals also rejected the other two arguments that petitioner raises in his petition. The court held that the district court had not abused its discretion in admitting the testimony and summary exhibit of the government's "expert summary witness" (Pet. App. A21-A24). And the court held that the district court had not committed plain error by delivering an "*Allen*" charge (see *Allen* v. *United States*, 164 U.S. 492 (1896)) without objection from petitioner (Pet. App. A27-A29).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is therefore not warranted.

1. Petitioner first contends (Pet. 23-49) that the admission into evidence of Kathleen Snyder's grand jury testimony was not permitted by Rule 804(b)(5) of the Federal Rules of Evidence and was prohibited by the Confrontation Clause of the Sixth Amendment.

Rule 804 of the Federal Rules of Evidence sets forth the instances in which hearsay statements by an unavailable declarant may be admitted. Rule 804(b)(5) provides that a hearsay statement not covered by any of the exceptions set forth in subsections (b)(1) through (4) "but having equivalent circumstantial guarantees of trustworthiness" may be admitted into evidence

> if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement

> is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

As the court of appeals noted (Pet. App. A8-A10), the circuits are in general agreement that grand jury testimony may be admitted under Rule 804(b)(5) in proper circumstances. See, *e.g.*, *United States* v. *Young Brothers, Inc.*, 728 F.2d 682, 692 n.11 (5th Cir.), cert. denied, 469 U.S. 881 (1984); *United States* v. *Barlow*, 693 F.2d at 960-963 (discussing cases); *United States* v. *Boulahanis*, 677 F.2d 586, 588-589 (7th Cir.), cert. denied, 459 U.S. 1016 (1982); *United States* v. *West*, 574 F.2d 1131, 1135-1136 (4th Cir. 1978); *United States* v. *Garner*, 574 F.2d 1141, 1143-1146 (4th Cir.), cert. denied, 439 U.S. 936 (1978); *United States* v. *Carlson*, 547 F.2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977).

Petitioner does not argue that such testimony is never admissible under Rule 804(b)(5), or that the decision below conflicts with the decision of any other court of appeals. Instead, he argues that the courts in this case erred in assessing the factors governing admissibility under the rule. Both the district court and the court of appeals, however, carefully reviewed the circumstances surrounding Snyder's grand jury testimony and held that it satisfied all the requirements of Rule 804(b)(5). They also found that Snyder's testimony was accompanied by substantial guarantees of trustworthiness, since it was corroborated by the trial testimony of other witnesses, including that of petitioner (compare 7/17/84 Tr. 20-73 with 7/18/84 Tr. 165-236). In addition, the lower courts noted that Snyder's testimony was given under oath and that it concerned facts within her personal knowledge. Finally, the courts observed that Snyder had no motive to testify

falsely and, if anything, had made an effort to exculpate petitioner (see Pet. App. A13-A14).[1] Accordingly, they concluded that the admission of Snyder's testimony complied with Rule 804(b)(5). The considerations recited by the district court and the court of appeals amply support admission of Snyder's testimony under Rule 804(b)(5); that fact-bound determination does not present any important question that warrants review by this Court.

Nor did the admission of Snyder's testimony violate the Sixth Amendment. It is well-established that the Confrontation Clause does not bar the use of all hearsay evidence at trial (*Ohio* v. *Roberts*, 448 U.S. at 63), nor does it automatically bar the use of hearsay evidence just because the defendant had no opportunity to examine the declarant. See, *e.g.*, *Dutton* v. *Evans*, 400 U.S. 74 (1970) (co-conspirator declarations); *Mattox* v. *United States*, 156 U.S. 237 (1895) (dying declarations). A defendant's right to confront witnesses must be balanced against society's "strong interest in effective law enforcement" (*Ohio* v. *Roberts*, 448 U.S. at 64). The balance is struck in favor of admissibility when the declarant is unavailable and his statement "bears adequate 'indicia of reliability' " (*id.* at 66). Reliability, the Court stated, can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, "the evidence must be excluded, at least absent a showing of par-

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[1] Petitioner asserts (Pet. 45-46) that a high degree of corroboration was required in this case because Kathleen Snyder's grand jury testimony related "evidence of criminal activity"—*i.e.*, that a large amount of cash was raised by Marchini Construction Company through the cashing of checks and that some of that money was paid to employees, although no record of the cash payments was kept. But this testimony was corroborated by the trial testimony of petitioner himself (7/18/84 Tr. 223). And, in any event, declarations by a witness concerning his or her involvement in criminal activity are usually regarded as *more* rather than less reliable than declarations about other matters. See Fed. R. Evid. 804(b)(3).

ticularized guarantees of trustworthiness" (*ibid.* (footnote omitted)). In this case, after scrupulously studying the record, both courts found particularized guarantees of trustworthiness with respect to Kathleen Snyder's grand jury testimony, for essentially the same reasons that supported the admission of the evidence under Rule 804(b)(5).[2] Those fact-bound determinations do not merit further review.[3]

Besides being based on a particularized assessment of the reliability of Snyder's testimony, the ruling of the court of appeals on the Confrontation Clause issue does not warrant review for another reason: the court's holding was narrowly confined to cases in which the grand jury testimony at issue is that of a witness-spouse who is

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[2] The court of appeals was careful to indicate that it was not establishing a per se rule that evidence admissible under Rule 804(b)(5) can always be admitted without violating the Confrontation Clause (Pet. App. A16-A17). The court required a "case-by-case analysis" (*id.* at A17), but it found that the facts of this case supported a determination that there were adequate indicia of reliability to satisfy the Confrontation Clause.

[3] There is no conflict among the circuits on the question whether the admission of grand jury testimony under Fed. R. Evid. 804(b)(5) violates the Confrontation Clause. In *United States* v. *Thevis*, 665 F.2d 616, cert. denied, 456 U.S. 1008 (1982), the Fifth Circuit did not reach the question whether the grand jury testimony in that case was properly admitted on other grounds (665 F.2d at 629). The *Thevis* court found that, by his conduct, the defendant had waived his rights under both the hearsay rules and the Sixth Amendment (*id.* at 630-633). The Fifth Circuit has subsequently stated that, even in the absence of a waiver, grand jury testimony may be admitted if it meets "the stringent reliability standards" of Rule 804(b)(5). *United States* v. *Young Brothers, Inc.*, 728 F.2d 682, 692 n.11 (5th Cir.), cert. denied, 469 U.S. 881 (1984). The Fifth Circuit also found it unnecessary to reach the issue in *United States* v. *Gonzalez*, 559 F.2d 1271 (1977). The court there simply held that the particular grand jury testimony at issue in that case lacked sufficient guarantees of trustworthiness to be admissible under Rule 804(b)(5) (559 F.2d at 1273).

unavailable solely because of the invocation of the marital privilege (Pet. App. A18-A19). The court of appeals noted that, in asserting the marital privilege at trial, Snyder "was acting in cooperation with [petitioner]" (*id.* at A18). As the court explained, it was petitioner's counsel who "discussed the privilege with [Snyder] and represented to the court that she would invoke her privilege" (*ibid.*). In that setting, although the witness-spouse may be technically "unavailable" for direct or cross-examination by the defendant, the defendant is likely to have a significant degree of control over whether the witness elects to testify. That appears to have been the case here, where petitioner married the witness after her grand jury testimony and before trial, and where the witness-spouse was "acting in cooperation" with petitioner in asserting her privilege. Limited as it was to that narrow factual setting, the court's ruling broke no new ground on the Confrontation Clause issue and did not put the Ninth Circuit into conflict with any other court.

Finally, review in this case would be inappropriate because the admission of Snyder's testimony, if error, was harmless beyond a reasonable doubt. As the courts below found, Snyder's testimony was confirmed by every witness who testified in this case and was corroborated by petitioner's own testimony.[4] If anything, her testimony reflected efforts to exculpate petitioner (Pet. App. A13). In short, even without Snyder's testimony, there could be no doubt about petitioner's guilt.

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[4] The court of appeals described Snyder's testimony as "cumulative" (Pet. App. A14). It is true, as petitioner points out (Pet. 48), that in the same sentence the court described her testimony as "unique." The two descriptions, however, are not contradictory. Snyder was uniquely qualified to describe her own actions in cashing several false supplier checks at petitioner's request (7/17/84 Tr. 35-67), but those actions were merely cumulative evidence of petitioner's guilt.

2. Petitioner also contends (Pet. 49-55) that the district court abused its discretion by admitting the testimony and summary exhibit of the government's "expert summary witness." Petitioner cites no case law to support his contention, and numerous circuits have approved the use of summary witness testimony when the witness has based his summary on the evidence adduced at trial and is available for cross-examination. See, *e.g.*, *United States* v. *Harenberg*, 732 F.2d 1507, 1513-1514 (10th Cir. 1984); *United States* v. *Scales*, 594 F.2d 558, 563 (6th Cir.), cert. denied, 441 U.S. 946 (1979); *United States* v. *Genser*, 582 F.2d 292, 298-299 (3d Cir. 1978), cert. denied, 444 U.S. 928 (1979); *United States* v. *Schafer*, 580 F.2d 774, 778 (5th Cir.), cert. denied, 439 U.S. 970 (1978); *United States* v. *Esser*, 520 F.2d 213, 218 (7th Cir. 1975), cert. denied, 426 U.S. 947 (1976); see also Fed. R. Evid. 702-704, 1006.

In the present case, the government's summary witness qualified as an expert witness (7/17/84 Tr. 124), his calculations were based on the evidence presented at trial (*id.* at 124-126), and he was thoroughly cross-examined (*id.* at 143-151). In these circumstances, the district court did not abuse its discretion by admitting the expert witness's testimony and summary chart. Essentially, the summary expert witness testified that he concluded from the evidence that petitioner had omitted wages from the tax returns at issue. He also explained that his calculation of the amount of the underreported wages was based on doubling the amount of wages paid by check, since he assumed from the evidence that half the wages had been paid by check and half in cash (Pet. App. A22). But the question whether petitioner paid cash wages was not in dispute, since petitioner admitted that all the false supplier checks were used to pay cash wages (7/18/84 Tr. 223). Petitioner also admitted that he failed to report those wages on the pertinent tax returns that his company was required to file (Pet. App. A3-A4). Finally, petitioner

admitted at trial (7/18/84 Tr. 229-230; Pet. App. A24) that it was fair to assume that half the wages were paid by check and half in cash. Accordingly, the only real question for the jury was petitioner's intent, and the government's expert witness offered no opinion on that issue.

3. Finally, petitioner contends (Pet. 55-58) that the district court erred in delivering an "*Allen*" instruction. Since petitioner failed to object to the instruction, any error must be reviewed under the plain error doctrine of Rule 52(b) of the Federal Rules of Criminal Procedure. The power granted to courts of appeals by that rule is to be used only in exceptional circumstances where the error is " 'particularly egregious.' " *United States* v. *Young*, 470 U.S. 1, 15 (1985) (quoting *United States* v. *Frady*, 456 U.S. 152, 163 (1982)). To constitute plain error, the error must be obvious or must "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). As the court of appeals correctly determined, there was no such error in this case.

Although the court of appeals acknowledged that it has " 'long recognized that injection of fiscal concerns into jury deliberations has potential for abuse' " (Pet. App. A29 (quoting *United States* v. *Mason*, 658 F.2d 1263, 1267 (9th Cir. 1981))), it also noted that it has repeatedly upheld the type of "*Allen*" instruction delivered in this case.[5] See *United States* v. *Seawell*, 583 F.2d 416, 417-418 n.2 (9th Cir.), cert. denied, 439 U.S. 991 (1978); see also *United States* v. *Arbelaez*, 719 F.2d 1453, 1461 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984); *Kawakita* v. *United States*, 190 F.2d 506, 524 n.17 (9th Cir. 1951) ("*Allen*"

[5] In part, the district court encouraged the members of the jury to reconsider their positions and the evidence with proper deference to the opinions of the majority, but it emphasized that the jurors should not surrender their honest convictions simply because other jurors differed (Pet. App. A27-A28). Petitioner concedes as much (Pet. 57).

charge referring to expense of trial not coercive), aff'd, 343 U.S. 717 (1952). Other courts have also approved the type of instruction that was given here. *United States* v. *Anderton,* 679 F.2d 1199, 1203-1204 (5th Cir. 1982); *United States* v. *Giacalone,* 588 F.2d 1158, 1166-1167 (6th Cir. 1978), cert. denied, 441 U.S. 944 (1979); *United States* v. *Stover,* 565 F.2d 1010, 1014 (8th Cir. 1977). In light of these precedents, the court of appeals correctly found no plain error in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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